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No. 89-1964

IN THE
Supreme Court of the United States
October Term, 1990

MENATSAGAN MELIKIAN and KAMBIZ AFTASSI,
Petitioners,

vs.

ANTHONY CORRADETTI; MORRIS COPPERSMITH; RUBIN BERNSTEIN; BERNARD WEINSTEIN; CORRADETTI ENTERPRISES, INC., t/a ANTHONY SALES; ANTHONY ASSOCIATES, INC.; R.A.M. PACKAGING; MEMCO TRADING CO., INC.; PHILBER SALES CORPORATION, t/a BERNIE WEINSTEIN; ANTHONY EXPORTING CO., INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

This Brief is submitted on behalf of respondents Bernard Weinstein and Philber Sales Corp. in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

QUESTION PRESENTED

Whether a prior decision of the United States District Court judge adverse to the petitioners constituted evidence of bias sufficient to require recusal pursuant to 28 U.S.C. 455(a).

COUNTERSTATEMENT OF THE CASE

Early in the history of this litigation, on February 13, 1985, United States District Judge Stanley S. Brotman granted a motion by respondents to dismiss the complaint for failure to state a cause of action. On May 28, 1986, Judge Brotman's order of dismissal was reversed by the U.S. Court of Appeals for the Third Circuit which also remanded the case to the district court to enable further discovery. *See,* Petitioners' Appendix A.

Four years later respondents sought dismissal on different grounds pursuant to Fed.R.Civ.P., Rule 37(b)(2). The motion sought to dismiss the complaint because of petitioners' repeated failure to provide discovery to respondents and the petitioners' refusal to obey three orders of the district court directing that the subpoenaed discovery be produced. On June 1, 1989, the United States Magistrate issued a Report and Recommendation advising Judge Brotman that the complaint should be dismissed for the reasons advanced in respondents' motion. *See,* Report and Recommendation, dated June 1, 1989, as filed by counsel for co-respondents.*

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*By letter of June 21, 1990, the Clerk of the Supreme Court of the United States advised petitioners that they had failed to include in their Appendix the Report and Recommendation of the United States Magistrate, dated June 1, 1989, and the opinion and order of Judge Brotman, dated June 22, 1989. The Clerk requested that petitioners submit such documents with a supplemental appendix, but petitioners have not so responded. At the request of the Clerk, Archer & Greiner, counsel for co-respondents, has filed the missing documents with the Court and they are so referred to in this instant brief.

On June 22, 1989, Judge Brotman adopted the Report and Recommendation and dismissed the complaint. In his opinion of that date, Judge Brotman noted that the petitioners had neither objected to nor disputed the Magistrate's findings. Judge Brotman further found that petitioners had repeatedly and deliberately ignored the court's discovery orders. *See,* Order and Opinion of U.S. District Judge Stanley S. Brotman, dated June 22, 1989, as filed by counsel for co-respondents.

Petitioners appealed to the U.S. Court of Appeals for the Third Circuit. Again, petitioners did not dispute the merits of the dismissal. Petitioners argued only that Judge Brotman should have recused himself because his original dismissal of the complaint in February 1985 evidenced bias against petitioners. Petitioners asserted that Judge Brotman thereby had no authority to issue the June 22, 1989 order of dismissal. On December 21, 1989 the Court of Appeals unanimously denied the appeal and affirmed the judgment of the district court. *See,* Petitioners' Appendix B. The Court of Appeals denied petitioners' application for rehearing on January 24, 1990. *See,* Petitioners' Appendix C.

This Petition followed.

SUMMARY OF ARGUMENT

The Third Circuit Court of Appeals correctly affirmed the dismissal by the district court. The complaint had been dismissed because of the petitioners' repeated and willful refusal to provide discovery as three times ordered by the district court. By refusing to hold that Judge Brotman should have recused himself, the Court of Appeals acted in a manner consistent with the universal holding that a prior adverse ruling alone is an insufficient basis on

which to permit recusal of a U.S. District Court judge. The affirmance is also consistent with this Court's decisions in *United States v. Grinnell Corporation,* 384 U.S. 563 (1966), and *Berger v. United States,* 255 U.S. 22 (1921), which have never been subject to legislative or judicial criticism or been seen to require modification.

ARGUMENT

The sole issue raised by petitioners is that Judge Brotman improperly refused to recuse himself following the Third Circuit's reversal of his February 1985 order of dismissal and thereby did not have the authority to grant the later order of dismissal on June 22, 1989.

Judge Brotman, however, was correct. It is universally accepted doctrine that a district judge may not recuse himself solely on the basis of a prior adverse ruling, even where later reversed on appeal.

In *United States v. Grinnell Corporation, supra,* this Court held that a prior determination on the merits is wholly insufficient as a basis for seeking recusal. 384 U.S. at 583. The *Grinnell* Court held that recusal may be employed only where there is a source of bias extrinsic to the litigation. Where the alleged bias relates to information learned by the judge in the course of the action, there is no basis for recusal. *Grinnell* states:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Id.* at 583.

The *Grinnell* standard has been uniformly interpreted by the circuits to preclude recusal in the case of prior

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adverse rulings. See, e.g., *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1987); *United States v. Giorgi*, 840 F.2d 1022 (1st Cir. 1988); *In re Little Rock School District*, 839 F.2d 1296 (8th Cir. 1988); *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287 (D.C. Cir. 1988); *Cippollone v. Liggett Group, Inc.*, 822 F.2d 335 (3d Cir. 1987); *United States v. Daly*, 564 F.2d 645 (2d Cir. 1977); *United States v. Irwin*, 561 F.2d 198 (10th Cir. 1977).

Grinnell itself is based upon this Court's earlier decision in *Berger v. United States, supra,* where the Court held that recusal may only be obtained where the alleged bias is based upon something "other than rulings in the case." *Id.* at 31. The Court in *Berger* noted with approval its earlier dictum that the recusal statute was "never intended to enable a discontented litigant to oust a judge because of adverse rulings." *Id., quoting, Ex Parte American Steel Barrel Co.*, 230 U.S. 35 (1913).

The affirmance below was thus well within the scope of *Grinnell* and *Berger.* Petitioners offered no evidence of the alleged bias of the district judge other than the mere fact that Judge Brotman had ruled against them in February 1985. Such an evidentiary showing has never been accepted as a sufficient basis on which to permit recusal under 28 U.S.C. 455(a).

Grinnell and *Berger* both reject the argument raised here by petitioners. The Court's decisions in *Grinnell* and *Berger* have been universally understood by the circuits to preclude recusal solely on the basis of a prior adverse ruling. Since *Grinnell* and *Berger* have been correctly applied by the circuits, there is no need for yet another consideration of the issue by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Bernard Weinstein and
Phillips Sales Corp.

Dated: July 30, 1990